UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 22-10943

- x

In the Matter of:

Voyager Digital Holdings, Inc.

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

March 15, 2023

2:03 PM

B E F O R E :

HON MICHAEL E. WILES

U.S. BANKRUPTCY JUDGE

ECRO: KAREN

HEARING re Motion for Stay Pending Appeal

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

MR. FOGELMAN: Your Honor, good afternoon again. This is Larry Fogelman, and the Government is ready to proceed. There are others in the courtroom who can identify themselves.

MR. MORRISSEY: Good afternoon, Your Honor. Richard Morrissey for the Trustee. I am also in the courtroom.

MS. SCHWARTZ: And, Your Honor, Andrea Schwartz with the U.S. Trustee in the courtroom and are on listen only.

THE COURT: Okay, very good. Once again, I apologize. This is entirely my fault for the confusion about how this would be conducted. But I just realized I wasn't going to be able to absorb everything last night and would have to spend the morning doing so and didn't want to use the time to commute.

I've read the Government's papers, I've read the Debtor's and Committee's papers, and I have some questions before I hear anything further.

Number one, Mr. Slade, in the original proposed confirmation order that was filed on February 28th, there was a paragraph that said that the exculpation would not provide -- not apply to the Government. Now, I never saw such a limitation in the plan itself. And obviously you've

changed that approach more than 180 degrees, I would say, in the next version of the confirmation order that you filed two days later. Where did that original provision come from? Did you have negotiations with the Government and initially agree to include that?

MR. SLADE: There were a lot of negotiations between us and the Government, Your Honor. I can't remember which version that you are speaking of right now. I do recall having discussions with the Government and then trying to have them clarify what they were trying to preserve. And then we had further discussions related to the impact of the bar date, and we wanted to make sure that we were clear that because the bar date order had been entered and a number of the entities that were engaging with us bout the plan had not filed claims, that nothing in the plan or the confirmation order would eliminate whatever rights that they lost by not filing the claim by the governmental bar date.

And it was at that point in time when basically based on their statements about what they might do in the future, we determined that we needed to make clear that once we actually implemented the plan, we were going to be able to do so free from interference until and unless the Government actually came out with substantive new rules that we could follow going forward. And that led to the language

that I think Your Honor pointed out was perhaps a little overstated in the plan. But there were a number of negotiations with a number of different governmental agencies, including Mr. Morrissey's office. I don't recall speaking with Mr. Fogelman until the confirmation hearing, but we did speak with a number of different federal and state agencies, and that led to different versions of the exculpation plan being proposed.

THE COURT: The language I have in mind is in Paragraph 141 of the first proposed version of the confirmation order that was filed on February 29th. It was at Docket Number 1120. And it says, "Nor shall anything in the confirmation order or the plan exculpate any such party," referring to various people, "from any liability to the United States or any of its agencies arising under the Internal Revenue Code, the environmental laws, or any similar criminal laws of the United States or under any rules or regulations enforced by the United States." That's pretty much the end of the relevant language.

The Government kind of hinted yesterday that it was taken aback or surprised by the exculpation that you sought. And I couldn't tell whether this was something you had agreed to with the Government and that you had changed your mind, whether it's an accident that it appeared in there. The limitation never appeared in the versions of the

plan that were filed. So where did this language come from and how is it that it got included and not immediately withdrawn?

MR. SLADE: I've got to be honest, I don't know the answer to that question. Maybe one of my colleagues on the phone knows. I was not involved in the negotiations that led to that version of the confirmation order.

MS. SMITH: Him, Your Honor. It's Allyson Smith at Kirkland. The language had been negotiated with the FTC. And that was why it was originally included. But then as Mr. Slade said, once it became clear that governments may try to retroactively assert actions, we did do -- we did pivot a bit.

THE COURT: Okay. All right. Wasn't something you negotiated with Mr. Morrissey or with the United States Trustee or with the United States Attorney's Office?

MS. SMITH: Not that I recall.

MR. MORRISSEY: Your Honor, this is Richard Morrissey. I believe -- and Ms. Smith can correct me if I'm wrong on this -- but I believe another intervening factor that led to the change of the language during the hearing was something that the Securities and Exchange Commission counsel had said as well. So I don't want to leave out any of the agencies or parties involved. So counsel to the Debtors can confirm or deny that that might have played a

role in the fact that we were taken aback, again, by the change in the proposed order in Paragraph 141.

THE COURT: There's -- well, I don't think there's any question that you were taken aback by the breadth of what the Debtors proposed on March 2nd. I'm not disputing that. I'm just turning to that original provision and whether you were somehow taken aback by the whole idea that exculpation would apply to the government. Because all of the filed versions of the plan had no exclusions for the government. It's just this one draft of the confirmation order in which that language appeared and then taken out in the next -- or certainly (indiscernible).

MR. SLADE: Yeah. I can confirm I don't think anybody had any discussion with Mr. Fogelman or his group before the confirmation hearing. I'm not aware of any such discussions.

MR. FOGELMAN: Your Honor, I've been supervising this case until quite recently, and now I'm more actively involved in it. I can tell you if the FTC negotiated for that language, the FTC is part of the United States and certainly inured to our benefit. We became more involved in the case -- look, earlier in this case, we had just filed a notice on behalf of CFIUS. And my colleague, J.D. Barnea, was the primary attorney working on the case at that time.

And that said, again, that the FTC asked for it

and it was included inure to our benefit. And we became very involved, again, when we saw that that language had been stricken because that was a substantial concern to us, Your Honor.

THE COURT: Well, you did nothing until after -- none of -- this language wasn't even on file until after the objection deadline. Nice try to kind of put everybody and the Government in the same boat, but I'm not going to accept the idea that you, the U.S. Attorneys Office, or the Justice Department somehow knew -- even knew or were relying on any of the discussions with the FTC, which apparently doesn't have any problem with what I've done.

MR. FOGELMAN: I'm not asserting, Your Honor, that the Government had been directly involved in those negotiations. Those are what they are. But at the end of the day, the Debtors put in an illegal provision in the confirmation order that substantially prejudices the United States that was not there the day that the confirmation hearing started. And it was removed -- that protection for the Government was removed. And we think that is absolutely wrong. Even in the Aegean case, which this Court has relied on, which the Debtors have relied on, the government had a carveout from exculpation that we quoted in our brief.

THE COURT: But there was no such carveout in any of the versions of the plan that were on file, to which you

didn't object. And there hasn't been such a carveout in many of the bankruptcy cases, which you know.

And so you say these things as though the whole idea that you are being subject to an exculpation came as a surprise to you. Nonsense. It was there in the original plan all along.

MR. FOGELMAN: Well, Your Honor, perhaps we should have raised it sooner. I appreciate that point and I certainly hear Your Honor on that. But at the end of the day, we did file an objection. We had permission from the Court to file it. We raised the issue with the Court as soon as it came up. The day that that exculpation provision -- sorry, the carveout from exculpation, the day that language was withdrawn, we filed an immediate letter to the Court alerting the Court to that concern. We asked for permission to brief that issue. We received permission to brief it, and we briefed it. And I don't think the fact that we perhaps could have asked for it sooner speaks in any way to the merits here.

THE COURT: Okay. But you keep saying that as though it was the removal of this carveout language that prompted you to act whereas the carveout language didn't even exist, there was no confirmation order or proposed order on filed up to the time of the objection deadline. And you said nothing. And what actually prompted you to act

was not the removal of this language, but the more explicit proposed additional language that the Debtor suggested, which would have said -- which would have barred the Government from ever contenting that anything that was done was illegal in any way. That's what kind of got you off of your feet and made you file an objection, isn't it?

MR. FOGELMAN: Your Honor, those two things happened at the same time. The carveout from exculpation was removed on the same day, the first day of the confirmation hearing that the --

THE COURT: Here's what I'm trying to get at. You implied several times that you've got lack of notice and that it was only because the qualifying language was removed that you acted. I think that's false. I think you did nothing and were doing nothing until the Debtors overreached and asked for additional things on March 2nd. I suspect you didn't even know about this qualifying language. That's what I am asking you.

So tell me, did you actually know about this language and were you relying on it?

MR. FOGELMAN: I can't speak for what my colleagues who have been handling this case knew and when he knew it. I don't dispute, Your Honor, that we have had notice of this case and that we did file a notice for CFIUS. And so to the extent that the Court is asking if we are

aware, I think, yes, we were certainly aware of all of the filings that have happened INTERPRETER: his case. And as Your Honor said, we perhaps should have acted quicker and asked for more affirmative language in this case. We didn't. But there was language that was negotiated by another federal entity. And so I don't dispute, Your Honor, that we were fully aware of this case and the various filings in it. And I think -- you know, I certainly take Your Honor's point that we did not raise an issue sooner.

THE COURT: Okay. So I'm not saying you're foreclosed from making an argument. I'm just saying that your argument that somehow this was new to you, this entire issue was new to you on March 2nd or that you had previously been relying on what that confirmation order allegedly said, you've suggested both those things, and I don't think they're true.

MR. FOGELMAN: Let me be clear, Your Honor. I don't think we were relying on any particular language in advance of it being entered into the confirmation order. We didn't ask for it. So I certainly agree with Your Honor on that point. It was the FTC -- and again, I was not involved. The FTC has independent litigating authority. So they did what they did. So I just want to make sure that -- I want to be a hundred percent candid and clear with the court. I am not taking the position that we were relying on

any carveout from exculpation. And I think Your Honor is right that we certainly became focused and aggrieved by it when we saw what had been removed and what had been inserted on that same --

THE COURT: No question. I understand your concerns about the language that the Debtors proposed.

MR. FOGELMAN: Yes.

THE COURT: I didn't give them what they proposed. It was excessive. It was overreaching. I agree a hundred percent. And I agree that it went so far beyond what they had originally proposed, that as to that language, you didn't have proper notice. I agree with all that. But I just --

MR. FOGELMAN: And again, I just want to make sure I'm candidly addressing Your Honor's concerns and being a hundred percent forthright with Your Honor. If you have any further concerns along those lines, I would like to address them right now. Because certainly I'm not trying to imply something that didn't happen. And if in any way my language may have conveyed that, I apologize. I certainly did not mean to do that. And I'm happy to just make clear exactly what we did and how we did it. And I am not trying to assert that --

THE COURT: You have explicitly argued that you didn't get sufficient notice. And I just don't see it.

MR. FOGELMAN: Well, I think if they were going to remove that exculpation carveout that was in the confirmation order, they should have told us that before the confirmation hearing. And it prejudiced our ability to prepare papers and to object to the plan.

THE COURT: But you didn't even know about the carveout. You just told me you didn't even know about it. So how were you prejudiced? It wasn't even a part of any discussions with you. You didn't know about it.

MR. FOGELMAN: That's fair, Your Honor. And when they added the, again, aggressive language -- I became aware of this when they took both steps on March 2nd. They added the very aggressive language and at the same time they removed the carveout from the exculpation clause. So reviewing those two things together was what really initiated the Government's more active involvement in this case.

And we were prejudiced because if they had tried to add that -- and I think maybe this is what Your Honor is getting at. Maybe it was the addition of the additional language, the very aggressive language, where we felt prejudiced. Because had the Debtors told us at any time before the confirmation hearing that that's what they intended to seek, we would have had more time to prepare an objection, to raise it with the Court in a timely manner,

and to argue it. And as it was, given that they did not propose that --

THE COURT: Except that it wasn't the confirmation order that made the proposal, it was the plan. You were on notice from December of 2022 what the Debtors wanted.

MR. FOGELMAN: That's correct. That's right.

THE COURT: From what you're telling me, you knew what the Debtors wanted. You had no reason to think they were excluding the Government from the scope of that. You filed no objection. They filed a first version of a confirmation order that, unbeknownst to you, had a provision in it that said it wouldn't apply to the Government, which they withdrew two days later. So that provision actually had no effect on whether you objected, whether you had notice of the objection, or anything. Right?

MR. FOGELMAN: Well, Your Honor, again, it was my -- because I was not on the line, so to speak, I was not the attorney immediately involved in reviewing filings and what was going on. I can't speak to what my colleague, Mr. Barnea, what discussions he may have had or what he was aware of and when. I just don't know, Your Honor.

THE COURT: There's an argument that you would suffer potential irreparable harm without a stay because your appeal might be rendered equitably moot. I assume you don't believe it would be rendered equitably moot, and you

would argue to the contrary. Am I right about that?

MR. FOGELMAN: We would argue to the contrary. That's right, Your Honor. But again, we are mindful of the caselaw in the Second Circuit that has found equitable mootness when even some number of steps have been taken in furtherance of a plan. And again, while we would dispute that that is appliable, we are certainly mindful that there is litigation risk on that point. And if we're wrong, we may be foreclosed from litigating the merits.

THE COURT: So how do I quantify how much your irreparable harm is when basically the only harm you've identified is something that your official position is that you wouldn't suffer?

MR. FOGELMAN: Well, Your Honor, I don't think that's entirely fair. Because the other side would tell you that they strongly believe that our -- any governmental enforcement would be equitably mooted.

THE COURT: I'm going to ask them their questions, too. Don't worry.

MR. FOGELMAN: Okay. Well, look, Your Honor, here's what it is. We don't think equitable mootness should apply. We might be wrong. There's Second Circuit caselaw out there that's not favorable to us. We're very mindful of that . And it's for that reason that we are acting diligently to affect a stay of the confirmation order, or at

least this exculpation provision, so that we have a full and fair opportunity to litigate it on the merits. Because if we are equitably mooted, then the Government would be severely prejudiced from its ability to protect public health, safety, and welfare by the exculpation provision. And that is a substantial harm to the public. No matter what percentage you assign to what risk there is on equitable mootness, when you multiply that by the overwhelming and substantial harm to the public -- and no matter how you calculate it, there is substantial harm threatened to the Government if there is not a stay that's granted.

THE COURT: Why? You know, the Government hasn't made up its mind whether there's anything wrong here. That much is clear. The instant it makes up its mind that it thinks there's something wrong, it can take action to stop it. And the only thing -- the only thing that my order does, notwithstanding your motion, by the way, which if you read it, you would have no idea what I had actually done. But the only thing my order actually does is say that in the meantime, the people who are doing what I am actually ordering them to do are not incurring liabilities to you for having done so. So how am I threatening the public health or safety by doing that?

MR. FOGELMAN: Your Honor --

THE COURT: All I'm doing is protecting people who have to do things at a time when, quite frankly, the Government can't make up its mind. That's all I'm doing.

MR. FOGELMAN: I don't think that's a fair characterization, Your Honor. First of all, we did specifically address Your Honor's point in that regard by saying that when government's regulators act, it's a rare case when they act prospectively. Much more commonly, crimes happen, civil violations happen, regulatory violations happen. And Congress has defined how long the Government has to investigate the facts of those violations and to pursue whatever claims or violations may have occurred.

And so Congress has determined that. We don't think it appropriate for the Court to say (indiscernible) Congress said about how long the Government has to investigate. There is a financial deal happening in this bankruptcy court which did not start until December. And now the plan that was confirmed in the beginning of March. So we're talking at most four months, maybe slightly over three months. I mean, for the Court to say if the Government has any problem with this deal, you must come forward or forever hold your peace, it's just not what Congress authorized, Your Honor.

THE COURT: I have not said any such thing. And

once again, you prefer to argue in terms of hyperbole instead of in terms of what I have actually done. I have never said that the Government should forever hold its peace. I don't know how I could have been any clearer in my decision and in the language of the order itself to the effect that the instant the Government wants to make any contention here, it is free to do it, and no contention is foreclosed. I have only done one thing.

Let's take for example the sales of cryptocurrencies. All right? The plan requires the Debtors to rebalance their portfolios because they can't otherwise make the distributions. And that means purchases and sales of cryptocurrencies. In fact, there is no conceivable way that the Debtors in these cases can be liquidated except by selling cryptocurrencies because that's the only asset they have.

Now, the SEC raised some issue as to whether VGX had aspects of the security but was unwilling or unable to take a position as to whether it is a security. So let's say that the Debtors sell cryptocurrencies, including VGX or buy them as part of the rebalancing over the next six weeks. And then the Government finally decides that for whatever reason it thinks that maybe some of those cryptocurrencies should be treated as securities or maybe VGX should be treated as a security. What public health or safety issue

am I impinging on by saying that the people who actually did those sales in the meantime under the authority of my order and under the direction of my confirmation order can't be held liable on an ex post facto basis for having done so and what limitation on your protection of the public interest am I imposing by that limited restraint?

MR. FOGELMAN: With respect, Your Honor, I understand the Court intended to narrow the order and did provide the additional ability for the Government to go into court at a later date if it determined something was wrong and to seek injunctive or other relief at that time.

But the problem with that order is that it insulates conduct that's occurring over the six-week period. And the order is quite broad in its language about everything that is essentially released during that time period.

So, for example -- and to answer Your Honor's hypothetical, let's say that crimes are committed or civil violations or regulatory violations in the process of distributing funds to customers. It's certainly conceivable that --

THE COURT: You don't seriously think -- look, I made quite clear in what I said that the basis for the order is that people are required by the plan to do certain things, and that's what they're being exculpated from. They

are required to transfer cryptocurrencies. So if you think that the very transfer of cryptocurrency is the problem, they'll be protected. But there's nothing in the plan or in my order that requires or authorizes them to commit theft, to lie to people in the course of buying or selling cryptocurrencies, or to commit fraud. And you're making things up by arguing that I have supposedly insulated them from things like that, because you know that I haven't, and you don't think that I have. You -- what you want to do is to protect and to allow the Government to say that the very things, the very act of trading in these cryptocurrencies or the very distribution of these cryptocurrencies might violate some other federal law. You want to reserve the right to argue that, the very thing that the confirmation order requires. And all the rest of this is made up. You know I'm not authorizing those things, and know that nobody would be able to interpret my order as authorizing those other things.

MR. FOGELMAN: So I think that the order may have unintended consequences. But let me address the heart of what Your Honor has said, is that the act itself -- you know, you're concerned that the Government would come back and say that the act of the distribution itself is illegal, or a civil violation, or a criminal violation. My response to that is while it's certainly conceivable that that could

happen, and I don't think this Court has the power to tell the Government that it can't do that, I mean, certainly one would expect any party subject to such an action to go into court and hold up your confirmation order and say, Your Honor, this was explicitly allowed by the bankruptcy court. The bk court made a finding that we acted in good faith. I mean, it's a hypothetical to say that the Government would actually go in and take that position in the face of this record and in the face of the findings of fact that this Court made --

THE COURT: If you say that's a hypothetical, then you're also necessarily saying that your entire irreparable harm argument is in hypothetical.

MR. FOGELMAN: Well, look, Your Honor, the problem is --

THE COURT: You can't have it both ways.

MR. FOGELMAN: Your Honor, the point is we don't know whether there will be civil or criminal violations that are committed. But -- and that's we think ultimately to the extent that the parties -- if anyone is charged or sued civilly, they would be able to raise whatever affirmative defenses they can along the lines of what Your Honor has in mind. And that is in cases under the only provision dealing with exculpation, 1125(e), that's how courts have handled it. They've said, well, this is an

affirmative defense. And that's entirely appropriate. And, frankly, we're very mindful that anyone would be able to raise the types of defenses that Your Honor has said.

But the problem, Your Honor -- and I know you think it's academic or perhaps we're just reading into this. But the exculpation order is so broad and so capacious that it would include things -- and from my reading of it, if the distribution agent doesn't protect customer privacy information and disclose it, or if the distribution agent negligently loses customer money, or if in the course of performing the "restructuring transactions" there are tax violations which don't require actual fraud, willful misconduct, or gross negligence. There could be KYC violations. There could be anti-money laundering violations.

Now again, of course Your Honor did not have that in mind. And I fully understand that this Court is not intending to insulate any such conduct. But I think the order by the nature of it is written so broadly to exclude anyone from liability relating to these restructuring transactions as long as there's no willful misconduct, gross negligence, or actual fraud. And the list of things that come under that -- that may not be captured -- sorry. The list of government actions that may be prevented by that language is substantial. And that is a real and genuine

harm. It's not speculative that this order would be in force whenever the confirmation order goes effective that says the Government can't do these things.

Now, I don't have a crystal ball. I don't know what's going to happen in the future. I don't know how the parties are going to act in following out the restructuring. But to the extent all they're doing is following Your Honor's literal instructions, I'm certainly appreciative that they're doing that and following Your Honor's instructions and acting, as the Court found, in good faith. And I fully expect that should there be any type of civil, criminal, or regulatory violation resulting from that, that those are the defenses, the affirmative defenses that would be raised.

But what the Court doesn't have the authority to do is to in advance, before we know any facts to release it -- so just one more example, Your Honor. In the context of -- if you think about an example where a federal district judge is sued who may have absolute immunity from liability. There's caselaw on that, absolute immunity for judges. Even they are not entitled to a release from suit. There may be facts that pertain to the defense of whether absolute immunity is appropriate given whatever the facts and circumstances are. And so to here, Your Honor.

Again, I fully appreciate what Your Honor is

trying to do. I'm not disputing that. I'm just saying that the appropriate mechanism to do that is by the party raising a procedural defense, an affirmative defense to say, hey, you can't pursue me for this because the court already found that I was acting in good faith, the court found that whatever findings of fact it made about the appropriateness of the restructuring transactions. And so -- well, I'll leave it there.

THE COURT: Okay. You know, the decision that I announced in court and then the written decision that I followed up on, I thought I was very clear that I was relying on authorities that were not third-party release authorities at all and that instead were based on the idea that people are entitled to protection when they are doing not only what a court has authorized or not only what they're doing in a quasi-official capacity, but what a court has explicitly directed that they do.

And I cited additional authorities including the Second Circuit's decision in Bradford Audio in the decision that I filed on Saturday. You've argued that you have a likelihood of success on appeal. You haven't discussed a single one of the cases that I cited. Not a single one. Why is that?

MR. FOGELMAN: I believe our brief did address some of the cases in the decision.

THE COURT: I searched it, and it didn't discuss a single one of them.

MR. FOGELMAN: I'm just trying to find the cites for Your Honor if you bear with me a moment.

THE COURT: I had cited the Aerodyne case, the Granite Broad. Corp. case, the Latam case, the Murray Metallurgical, Ditech. And then in my written decision, the Bradford Audio decision, Dana Commercial Credit Corp., Bullion, Phoenician Mediterranean Villa, and In re XRX. And also the T&W Investment Company v. Kurtz case. I cited all of those.

MR. FOGELMAN: Your Honor, in Paragraph (indiscernible) of our brief, we did address that none of the cases cited in the decision addressed governmental enforcement actions, let alone criminal actions. And so we did -- we didn't address particular cases. I think it's because the -- the reason we're likely to prevail on the merits is that at the end of the day, there is absolutely no congressional authority for the relief that was given. I don't think there was a citation. The only statute Your Honor cited that gives -- that Your Honor said gives it the authority to give this kind of exculpation was 1142(a). 1142(a) said that the Debtor and any entity organized or to be organized --

THE COURT: I understand. But you're kind of

carving my justification in half when you say that. What I said was the authority was the fact that I was ordering something and parties, by virtue of 1142(a), would have to do what I had approved and ordered in the confirmation order and under these other authorities that I cited it was appropriate that in doing so, they have the security that, as I put it, I am not sentencing them to incur personal liabilities and to subject themselves to kind of a belated argument that what I had told them to do was somehow illegal.

MR. FOGELMAN: I understand that, Your Honor. And I would say that I believe those cases address affirmative defenses of qualified immunity. Again, affirmative defenses, not releases provided in advance. And I understand that is a procedural difference, but it's a procedural difference that has substantial import for the Government. We don't dispute that people should be able to raise any affirmative defense from -- exactly from what Your Honor said, from carrying out the plan and complying with --

THE COURT: So if my order -- if my order had said exactly the same thing as it said -- so if the proviso that begins in the first paragraph that says to the fullest extent permissible under applicable law. You know, so it was quite clear that, you know, was something that applied to each paragraph, what would your problem be?

MR. FOGELMAN: I think it still implies that there is a release that is appropriate and that can be given and that the Court it sounds like is very much intending to give. And again, my concern and the Government's concern is that there's no statutory authority to grant a release. The cases that Your Honor cited deal with affirmative defenses that could be raised. Your Honor didn't say parties can raise any affirmative defenses based on following my orders. The Court instead said the government was released from anything to do with --

THE COURT: Let's focus very specifically on the very fact, the mere fact of doing rebalancing transactions and distributing cryptocurrency.

MR. FOGELMAN: Okay.

THE COURT: Are you saying that parties should not be exculpated just for doing those things and that you should have the right to punish them later for claiming that just those things, for example, are violations of securities laws? Is that what you're contending?

MR. FOGELMAN: So let me be clear. My contention is that there is no entitlement to a release for the Government enforcing the law, and that the Government has the time that Congress gave under whatever applicable statute of limitation there is to evaluate if a transaction is problematic and to take any regulatory or enforcement

steps that might be warranted.

However, I also am recognizing that, as Your Honor has indicated, the parties are following the order of the Court. I am mindful of the fact-finding that the Court has made that the parties have been acting in good faith. And I certainly anticipate that if anyone brought any kind of action based on what the Court is directly ordering those parties to do, that those parties would hold up the Court's findings of fact, orders in the case, and say hey, what's the Government doing here. I fully appreciate that.

And so -- but where we have a substantial problem and disagreement is the power of the Court to not just make findings of fact and conclusions of law -- which, look, courts deal with all the time in terms of res judicata, collateral estoppel, and any other affirmative defenses that might be applicable. But to turn around and give what really is in substance a third-party release or a release to the Debtors who are liquidating and don't even get a discharge for their future actions that haven't even occurred yet or the government doesn't even know what they're going to do or how they're going to do it, that's the fundamental problem, Your Honor.

THE COURT: Let me ask the Debtors. Why do you contend that an appeal here would be equitably moot if there isn't a stay order?

MR. SLADE: I think it's equitably moot, Your Honor, under the caselaw precisely for the reasons that you've described. Because we are acting under color of the Court's order. And Mr. Fogelman's argument that we don't know what we're going to be doing, I mean, that's just wrong. The transactions are described in detail in the plan, the confirmation order, and in the documents that we submitted that Your Honor authorized us to do. So we are going to be doing that. And so when we're on appeal if they're challenging these same arguments, we are going to say we are following the Court's order, we are doing exactly what we told the world that we would do, and the Government didn't object. And for that precise reason, the exculpation clause can't be stricken because the argument is equitably moot.

For similar reasons that other confirmations have been -- appeals have been dismissed on equitable mootness grounds because parties are taking action and relies on the Court's order, that's a traditional ground for a finding of equitable mootness, and that's exactly the similar argument that we are going to be making.

And I wanted to be very clear in our brief, and I'm just going to say it now. And our position is not wishy-washy at all. Our position is once Your Honor gives us authority to go forward with the transaction, we're going

to do that. And then we're going to argue that appeals are equitably moot for the same reason that we need the exculpation clause in the first place, which is to protect the people that are relying on Your Honor's order from the same sorts of concerns that Mr. Fogelman is talking about.

He's saying specifically it's conceivable the Government might come after us after the fact for executing exactly what we told Your Honor we would be doing. That is not appropriate. That is not appropriate. People need to be able to rely on the court's order. And that's why these issues are inextricably intertwined.

THE COURT: And if an appellate court were to decide tomorrow that this provision should be stricken, are you saying you wouldn't proceed?

MR. SLADE: I'm not sure what we would do, Your Honor. I think it's a significant issue. And we would have to decide whether or not we're going to go forward with the plan at all and whether we would have to convert the case. I mean, the question is whether the professionals that are going to be doing these things are willing to take these actions when the Government can't make up its mind on what to do with crypto.

I mean, Your Honor experienced during the confirmation hearing exactly what the crypto community has been experiencing for years. The Government can't make up

its mind, and they won't give anybody a straight answer, including today. So there might be some people that are willing to take the risk that the Government is going to go after them after the fact and they're going to have to rely on the affirmative defense that Mr. Fogelman mentions. I'd have to talk to my malpractice carrier before I was willing to take that risk.

But his argument that that's what we should be relying on, the ability to take action after the fact, that doesn't give anybody any comfort. I mean, the concern is that the decisions that the Government is going to make in the future are going to be driven by politics, not by law. I think what we've experienced totally validates those concerns 2,000 percent.

So Your Honor asked if we're going to convert the case if we don't get exculpated. I'm not sure I can answer that question. It's hypothetical. But it's a real possibility. And I think we would have to think seriously about it.

Just think, for example, about the plan administrator. He is a clear target of the United States Trustee's Office. They do not want him to be exculpated. Would you take that job, Your Honor, if there weren't protections on the front end? I'm not sure anybody would.

MR. FOGELMAN: Your Honor, if I can just respond

briefly. There is a million commercial deals that happen outside of the bankruptcy context every day where parties necessarily have to think about the risk, evaluate the legal landscape, certain or uncertain, whatever it may be, and decide what to do.

The idea that for an action that's going to happen in the future debtors need a blessing from the Court that no matter what they do in carrying out that deal or the deal itself, that they can't be liable, I mean, there's no precedent for that.

Look, think about a consent decree in any federal district court. There are plenty of district court consent decrees that have complicated actions that are going to be going forward based on whatever arrangements the parties have made that a court is also so ordering just by virtue of so ordering it. You know, I am not aware of any consent decree where a court has -- and by the way, in doing this, you can't be liable to any government regulator. But presumably if someone went after them, they would go back to court and hold up that consent decree. But the idea that the Debtors here need some type of special treatment or some assurance, I mean, they're businesspeople. They make those decisions every day all the time as they did before the bankruptcy. So it's just -- I'm not sure how much it advances their point to say that they are having a hard time

making up their mind here what to do in the absence of exculpation.

MR. ASMAN: Your Honor, it's Darren Asman from McDermott for the Committee. May I be heard briefly on this?

THE COURT: Yeah.

MR. ASMAN: Your Honor, everything that you just heard Mr. Slade say is the exact reason why the public interest element counsels against granting a stay. If the Government is correct -- and they are not -- then practically no Chapter 11 plan would be consummated out of fear of prosecution by governmental agency and the entire purpose of Chapter 11 would be defeated. This is not an out-of-court commercial transaction. The whole purpose of bankruptcy is finality. That is why we get court orders. That is why we get a plan that is confirmed by a federal bankruptcy court. The whole integrity of the Chapter 11 process far outweighs the Government's desire to preserve its optionality as to whether to prosecute the estate, the debtor, the plan administrator, law firms, financial advisors who are acting under a federal court order for hypothetical violations of securities laws that no one has articulated.

We don't accept this proposition that essentially every order Your Honor enters in a bankruptcy case has a big

asterisk at the end of it that says, but watch out, the Government might sue you on this. The Government gets notice of everything in this case just like every other interested party. They can either come forward or stay silent. They have not actually stayed silent here, but effectively they have stayed silent here. They haven't articulated anything that is illegal about this plan, and that is on them.

THE COURT: I've read all of the papers and considered them in detail. And I don't think that they warrant a stay. But I am very concerned that a district judge who will be picking this up, who won't already be familiar with the entire history of exculpation provisions in bankruptcy court, for example, I am very concerned about pleasing a district judge who might be presented with this same stay application to the extent that I deny it. And our stay is actually expiring in an hour and five minutes, which is less time -- I think an hour and five minutes. Maybe two hours and five minutes. That's actually less time than it will take me to issue a ruling that I think I should issue on this so the district court can consider it.

So let me ask the Debtors and the other parties. I didn't grant the 14-day stay that ordinarily would have been in effect. It's continued only through today. What would be the big deal about extending it through Monday just

out of consideration for the timing of the district court and so the district court can have the time to actually read all of these papers and to actually read my decision and not be confused as to what it is that I actually did and why I did it.

MR. SLADE: Your Honor, Mike Slade for the Debtors. The Debtors do not intend to close a transaction this week, as I said when we were on the phone yesterday. At Your Honor's request, we would be okay extending the stay until then so that Your Honor can render a ruling. That's fine with us.

THE COURT: Okay.

MR. ASMAN: Your Honor, the Committee is okay with that as well. We understand the concern and we want you to make a good record for the district court.

THE COURT: Well, I think in fairness to the district court, they should understand my thinking of the points.

MR. MORRISSEY: Your Honor, if I may. Richard Morrissey for the U.S. Trustee. I just wanted to add some color to the issue of the plan administrator and also remind the Court of the sequence of events with respect to the plan administrator.

The plan administrator was added to the list of exculpated parties after the hearing had been concluded.

The plan administrator had an agreement to limit his liability, a separate agreement. So the Government certainly did not have an opportunity to object to the addition of the plan administrator. I just wanted the Court to be --

THE COURT: So wait a minute. The plan administrator just replaced the original concept of a winddown trustee and the exculpation provision to be applied to the plan administrator is the same as what was proposed for the party that he is replacing. Isn't that the correct case?

MR. MORRISSEY: Your Honor, actually I'm not sure about that. Perhaps one of the attorneys can confirm that. Because there was a change between the winddown trustee who became the winddown debtor. Somewhere along the --

THE COURT: Basically they changed entities, names, titles, concepts. But the functions to be performed, I think they were always all within the same exculpation provision, weren't they. Isn't that right, Mr. Slade?

MS. OKIKE: Your Honor, Christine Okike on behalf of the Debtors. That's correct. The winddown trustee was just changed to the plan administrator. It was just a change in the title.

THE COURT: I'm going to issue a decision as quickly as I can. And I would really attempt to get

something on file tonight. But what do we do about the current stay? Will everybody agree that it's stayed until Monday even if we don't get an order on file by 5:00? Do you want to quickly put together such an order? What do you want to do?

MR. SLADE: Your Honor, Mike Slade for the Debtors. We can send you an order similar to the one we sent you the last time that extends through Monday at 5:00 if that would be okay with the Court.

THE COURT: Okay. That would be fine. Let's do that right away. Do you need -- share it with the Government so they can see it. Okay?

MR. SLADE: Yes. I will send it to them in the next ten minutes.

THE COURT: All right. In that case, I know there are a lot of arguments to be raised. I think I understand them all. And I'm not trying to cut people off, but more important, I think that I get my own thinking down for the benefit of the district court. And I think I understand all the other arguments. But is there anything else with that statement that anybody else wants to day today?

MR. SLADE: Nothing for the Debtors, Your Honor. Thank you.

MR. ASMAN: Nothing for the Committee, Your Honor. Thank you very much for your time.

MR. FOGELMAN: Nothing from the United States, Your Honor.

MR. MORRISSEY: And nothing from the U.S. Trustee. Thank you, Your Honor.

THE COURT: All right. Thank you all very much. I'll look for the stay order and I'll get something on file this week.

(Whereupon these proceedings were concluded)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: March 16, 2023

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